

Decision **ALTERNATE DRAFT DECISION OF COMMISSIONER LYNCH**  
(Mailed 11/15/02)

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Amended Application of Marine Services Express, Inc., a California corporation, for a Certificate of Public Convenience and Necessity to Establish and Operate Scheduled Vessel Common Carrier Service between Designated Points and Places in the greater San Francisco Bay Area pursuant to and under contract(s) with Government or Private Entities on an Emergency, Interim, or Continuous Basis.

Application 99-01-003  
(Filed January 5, 1999)

**OPINION DISMISSING APPLICATION**

**1. Summary**

The Commission dismisses this application in which Marine Services Express, Inc. (Marine Services) seeks "blanket" authority to operate a number of publicly or privately sponsored vessel common carrier services on San Francisco Bay (S.F. Bay), subject only to a registration requirement for each service as and when Marine Services enters into or competes for the pertinent service contract. The authority Marine Services requests would create a new permitting regime that applies only to it, without consideration of or coordination with recent legislative mandates related to ferry service on S.F. Bay.

## **2. Procedural Background**

Marine Services (then called Hornblower Marine Services East Bay Express) filed this application for a Certificate of Public Convenience and Necessity (CPCN) in anticipation of winning a contract from the City of Alameda and the Port of Oakland to run the Oakland/Alameda Ferry Service. Ultimately, Marine Services was not awarded the contract. It then amended the application to seek a CPCN that would in effect pre-approve ferry service it would offer at any time in the future, on any route in the San Francisco Bay Area (Bay Area). Blue & Gold Fleet, L.P. (Blue & Gold) timely protested the amended application.

The parties entered into settlement discussions and submitted a proposed settlement for our approval, which we rejected in Decision (D.) 01-05-020 (May 3, 2001). We determined that the proposed settlement would institute changes in our procedures that went far beyond the scope of an individual application proceeding and could only be undertaken after formal notice and comment rulemaking. We granted the parties 60 days to submit a new settlement proposal in accordance with guidelines set out in our decision.

The parties timely filed a new settlement proposal. After an additional prehearing conference, the parties agreed on revisions to the amended application (revised application). Blue & Gold withdrew its protest, on the condition that Marine Services would not protest if Blue & Gold later asked for similar treatment from the Commission. We therefore have before us only Marine Service's revised application.

### **3. The Revised Application**

In relevant part, Marine Services proposes that it would be able to establish and operate as many as five scheduled vessel common carrier services on S. F. Bay under authority we would initially grant for a period of two years, but which Marine Services would be able to renew for additional time.<sup>1</sup> Upon formal application by Marine Services, the Commission could increase the number of routes authorized. The services covered by the granted authority must be publicly or privately sponsored, not instituted on the sole initiative of Marine Services, and must not compete with any services serving the same points on the same routes. Marine Services would be able to commence a particular service without further review, after registering its intention to undertake the service by providing specified information to the Executive Director.

### **4. Discussion**

In D.01-05-020, we concluded that the original settlement proposal in this proceeding would have set new rules and procedures for the Commission, which could not be accomplished through the settlement of an individual proceeding. In the revised application, Marine Services proposes a method of approving ferry service on S.F. Bay that would change our normal approach to CPCN issuance for vessel common carriers, but only with respect to services to be provided by Marine Services. While this solves the problem of making new rules of general applicability through an individual settlement, it introduces a different, but

---

<sup>1</sup> If not exercised within the two-year period, the authority would expire unless the Commission extended it upon formal application by Marine Services.

equally fatal, problem: new rules that apply only to the individual applicant, one of several ferry companies serving S.F. Bay. The possibility that Blue & Gold might seek similar authority in the future only highlights, rather than resolves, the issues of individualized, *ad hoc* changes to our process of reviewing ferry service applications, including the issues of fairness and compliance with notice and comment rulemaking that we noted in D.01-05-020.

Moreover, the parties' approach to our concerns in D.01-05-020 has been overtaken by events. The Legislature has created and given initial funding to the San Francisco Bay Area Water Transit Authority (Water Transit Authority)<sup>2</sup> to undertake a comprehensive review of ferry service on S.F. Bay and submit to the Legislature by the end of 2002 a preliminary draft of an Implementation and Operations Plan for water transit in the Bay Area.<sup>3</sup> We should not undertake the kind of *ad hoc* revisions of our existing rules and procedures regarding vessel common carriers that this application proposes while the legislatively mandated planning process is going forward. Pub. Util. Code section 1708.5 provides a more appropriate mechanism for systematic consideration of revisions to our regulations, allowing any person interested in changes to our existing rules to bring them to our attention for possible action.

In D.01-05-020 we also expressed concern that the proposed settlement was inconsistent with our responsibilities under the California Environmental

---

<sup>2</sup> Gov't. Code sections 66540 *et seq.* Information about the Water Transit Authority and related documents can be found at its Web site, [www.watertransit.org](http://www.watertransit.org). We take official notice of the Water Transit Authority's publication of a Draft Implementation and Operations Plan (September 2002), [www.watertransit.org/iop](http://www.watertransit.org/iop), and of a Draft Program Environmental Impact Report (August 2002), [www.watertransit.org/eir](http://www.watertransit.org/eir).

<sup>3</sup> Gov't. Code sections 66540.20-.22.

Quality Act (CEQA), Pub. Res. Code section 21000 *et seq.* The registration process that is a central feature of the revised application, while it expressly addresses CEQA issues, does not meet this concern.

The revised application requires that a notice of intent to provide a particular service under the blanket authorization must be submitted to the Executive Director at least 60 days before the anticipated commencement of the service. The notice of intent must include, among other things:

Identification of the agency or agencies other than the Commission which have conducted, or will conduct, environmental review of any aspect of establishment of the service under the California Environmental Quality Act (CEQA), and the nature, scope and status of such review. If any such review is being conducted at the time its notice is filed Marine Services will furnish pertinent documentation as part of its notice, and will include documentation of any final determination where such review has been concluded. If no other agency has conducted, or will conduct, such review, the registration notice must include information sufficient to enable the Commission to perform environmental review as the responsible agency under CEQA.

Marine Service's registration of a new service, and thus its authority to commence the service, would be complete if the Executive Director determined that all required information had been submitted. There is no mechanism for the Executive Director or the Commission to delay or halt the effectiveness of the registration if CEQA review has not been completed, as long as Marine Services correctly reported the status of the CEQA process in its notice of intent. This registration procedure, if implemented, would be inconsistent with our

obligations as a “responsible agency”<sup>4</sup> under CEQA, which requires that “[p]rior to reaching a decision on the project, the responsible agency must consider the environmental effects of the project as shown in the E[nvironmental] I[m]pact R[e]port or negative declaration.” CEQA Guidelines section 15096(f)(emphasis added). If registration of a new ferry service is complete before the EIR or negative declaration has been completed, we will not be able to undertake the mandated consideration.

### **Categorization**

In Resolution ALJ 176-3008, dated January 20, 1999, the Commission preliminarily categorized this application as ratesetting, and preliminarily determined that hearings were not necessary. The only protest has been withdrawn. Therefore, we affirm the preliminary determinations.

### **Assignment of Proceeding**

Loretta Lynch is the Assigned Commissioner and Victor Ryerson is the assigned Administrative Law Judge in this proceeding.

### **Comments on Draft Decision**

The alternate draft decision in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(d).

### **Findings of Fact**

1. Marine Services did not receive the contract to operate the Alameda/Oakland Ferry Service that was the original subject of this application.

---

<sup>4</sup> Pub. Res. Code section 21069 defines “responsible agency” as “a public agency, other than the lead agency, which has responsibility for carrying out or approving a project.”

2. Marine Services and Blue & Gold timely filed a proposed amended settlement in response to D.01-05-020.

3. The procedures for authorizing vessel common carrier service proposed in the revised application apply only to Marine Services.

4. Marine Services agreed not to protest if Blue & Gold asks that similar procedures be applied to its ferry services on S.F. Bay.

5. The proposed procedures for authorizing Marine Services to commence vessel common carrier service on S.F. Bay allow such service to commence prior to completion of environmental review required by CEQA.

6. The Water Transit Authority has begun the comprehensive study of water transit on S.F. Bay mandated by the Legislature.

### **Conclusions of Law**

1. This is an ex parte application proceeding, because Blue & Gold, the only protestant, withdrew its protest.

2. The application should be dismissed because it seeks a change in Commission procedures for reviewing applications for vessel common carrier services that would apply to only one of several ferry services operating on S.F. Bay.

3. The application should be dismissed because, if granted, it would create a potential conflict between the process for Marine Services to exercise its authority to commence ferry service and the Commission's obligations under CEQA.

4. This decision should be effective immediately in order to eliminate uncertainty about procedures for permitting ferry service on S.F. Bay.

**O R D E R**

**IT IS ORDERED** that:

1. Application 99-01-003 is dismissed.
2. This proceeding is closed.

This order is effective today.

Dated \_\_\_\_\_, at San Francisco, California.